SUPREME COURT, U. S

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-1809

UNITED STATES OF AMERICA,
Petitioner,

v.

WILLIAM GARLAND BRADSHAW,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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REASONS FOR DENYING THE WRIT

In the trial of this cause, and more particularly in the court of appeals, the government advanced two theories for the admissibility of the questioned evidence. They were the so-called "plain view" and "automobile" exceptions to the warrant requirement of the Fourth Amendment.

1. In its Petition filed in this Court the government presents three questions, the first of which involves "plain view". However, the government then appears to concede

that the "plain view" exception does not apply to the facts in this case because of the further intrusion necessary to make the seizure of the questioned evidence. (Petition, pp. 8, 9)

It is respectfully argued that the government's argument and the decision of the court of appeals, although worded differently, is exactly the same with regard to the "plain view" exception.

The only difference between the two appears to be that the government now urges this Court to say that a federal officer can smell the aroma of non-tax paid whiskey and that when he says he does that constitutes a "plain viewing"; whereas the court of appeals said such smelling (both theories first require a finding that an officer can determine the non-tax paid status by smell alone) only gave rise to probable cause. But it seems to be conceded that under either theory, standing alone, the evidence would not thus be admissible under the "plain view" exception.

2. The government then advances two additional theories for the admissibility of the seized evidence. The first, discussed under point 2 of the Petition (p. 10) appears to be the drafting of a new exception to the warrant requirement which "depends upon the nature and extent of the privacy interest invaded."

The government contends that it would have made no difference in this case even if the whiskey "had been stored in a bin."

The only reasonable interpretation of this argument in light of the examples given and the facts of this case is that the Fourth Amendment warrant requirement should be reduced to include only a person's actual house or place of residence and the articles therein.

The government notes that the officers were lawfully on respondent's premises. This conclusion accepts the court of appeals determination of such lawfulness (App. A, p. 6a n.1). This Defendant has, of course, not complained of this determination for the simple reason that the court of appeals total decision was favorable to him. However, it is respectfully submitted that this Court, in determining whether to grant the Writ in this case, should consider this determination in light of the total facts and circumstances surrounding the officers going to the Defendant's premises as revealed by the entire record.

The only reason given by the officers for going to Defendant's house was to inquire about an old abandoned car located some distance from his house and emanating the aroma of whiskey (Tr. 20, 29, 39). It is difficult to imagine the officer expecting Defendant to admit any connection with the old car under such circumstances.

It is likewise difficult to believe that the officer's smelling of the whiskey at the Defendant's house could amount *only* to a suspicion falling short of probable cause at any point in view of the fact that their only purpose in being anywhere in the vicinity in the first place was to search for whiskey (Tr. 4) and they had searched the area surrounding the protected curtilage for an hour to an hour and a half before going to Defendant's house (Tr. 86, 87).

3. The government last argues that the "automobile" exception to the warrant requirement applies to the facts of this case and further that the court of appeals decision is in conflict with *Chambers v. Maroney*, 399 U.S. 42, and with the Ninth Circuit's ruling in *United States v. Connally*, 479 F.2d 930.

It is further contended that the court of appeals misinterpreted and misapplied *Coolidge v. New Hampshire*, 403 U.S. 443.

We believe that it would be of little use to this Court or little value to this Brief to set out numerous cases involving the "automobile" exception and attempt to distinguish or align them factually with the instant case.

We believe that the problem in these type cases as well as the general guidelines and basic differences are well pointed out in the recent case of *Cady v. Dombrowski*, ___ U.S. ___, 93 S.Ct 2523.

The problem as was well stated in *Cady*, ___ U.S. at ___, 93 S.Ct. at 2527:

> "'We made it clear in *Preston* that whether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case and pointed out, in particular, that searches of cars that are constantly movable may make the search of a car without a warrant a reasonable one although the results might be the opposite in a search of a home, a store, or other fixed piece of property. 376 U.S., at 366-367 [84 S.Ct., at 882-883].'
>
> "While these general principles are easily stated, the decisions of this Court dealing with the constitutionality of warrantless searches, especially when those searches are of vehicles, suggest that this branch of the law is something less than a seamless web."

This Court then pointed out in *Cady*, *supra*, that there is a difference in the nature of the contact with automobiles between federal and local officers. In the instant case there was no independent reason for any officer to be any-

where near the vehicle (truck), such as an accident, examining registration, or investigating the owner. The Court noted that police-citizen contact with automobiles is usually greater than police-citizen contact in a home. However, in the instant case the police-citizen contact was in fact at a home and the vehicle contact was incidental thereto.

In *Cady*, *supra*, the Court also pointed out that there is a definite distinction in situations where contact with an automobile is other than when ". . . parked adjacent to the dwelling place of the owner as in *Coolidge*, *supra*, . . ." (___ U.S. at ___, 93 S.Ct. at 2530).

We believe that the court of appeals correctly applied the rationale of *Coolidge*, *supra*, to the facts of this case.

It is respectfully argued that, especially in view of the facts and circumstances of this case, if the Court granted the Writ in this case it would do nothing to improve the "web" or have "substantial significance for law enforcement", as contended by the government, for the reason that each case turns upon its own facts in this area of the law. For the same reason, it is also respectfully argued that there is no genuine conflict among the circuits.

This reason for not granting the Writ was best stated by the Court in *Cady*, *supra*, ___ U.S. at ___, 93 S.Ct. at 2531:

> "Very little that has been said in our previous decisions, see *Cooper*, *supra*, *Harris*, *supra*, *Chambers*, *supra*, and very little that we might say here can usefully refine the language of the Amendment itself in order to evolve some detailed formula for judging cases such as this."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should not be granted.

Respectfully submitted,

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